69

Supreme Court, U.S.
FILED
07-491 OCT 10 2007
OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

PIONEER RANCH LIMITED PARTNERSHIP
AND ROBERT S. WHITING,
Petitioners,

v.

HOWARD MCDOUGALL AND
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT GRAHAM
Counsel of Record
HOWARD & HOWARD ATTORNEYS, P.C.
151 SOUTH ROSE STREET, SUITE 800
KALAMAZOO, MICHIGAN 49007
TELEPHONE: (269) 382-1483

Counsel for Petitioners

October 10, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the rationale used in this Court's decisions in *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) and *Curtis v. Loether*, 415 U.S. 189, 195, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), demonstrates that the Seventh Amendment guarantees the right to jury trial on the issue of whether a party is an employer for the purpose of 29 U.S.C. § 1301 where the party is allegedly subject to employer withdrawal liability solely as a member of a controlled group.

LIST OF PARTIES

All parties to this case are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pioneer Ranch Limited Partnership is a Michigan limited partnership. No publicly held company has any ownership interest in Pioneer Ranch Limited Partnership.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES vi

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR ALLOWANCE OF THE WRIT .. 4

REVIEW OF THIS CASE IS WARRANTED IN ORDER TO CLARIFY THE SCOPE OF THE RIGHT TO JURY TRIAL IN ERISA AND MPPAA CASES IN WHICH THE SOLE RELIEF REQUESTED IS LEGAL, AND THERE IS NO CONGRESSIONALLY MANDATED OBLIGATION TO ARBITRATE THE DISPUTE 5

CONCLUSION 10

APPENDIX

Appendix A: Opinion of the United States Court of Appeals for the Seventh Circuit Dated and Decided July 12, 2007 ..... 1a

Appendix B: Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois Dated and Filed July 20, 2006 ..... 17a

Appendix C: Judgment Order of the United States District Court for the Northern District of Illinois Dated September 29, 2006 ..... 33a

Appendix D: November 14, 2005 Amended Answer to Complaint Requesting Jury Trial Filed by Pioneer Ranch Limited Partnership and Robert Whiting 35a

Appendix E: Statutes Involved 47a

TABLE OF CITED AUTHORITIES

Cases

Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission,
430 U.S. 442, 97 S.Ct. 1261,
51 L.Ed 2d 464 (1977) 8

Bugher v. Freightner,
722 F.2d 1356 (7th Cir. 1983) 9

Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.,
974 F.2d 789 (7th Cir. 1992) 8

Central States, Southeast and Southwest Areas Pension Fund, et al. v. Pioneer Ranch Limited Partnership, et al.,
(No. 05 C 5908, July 20, 2006) 1

Curtis v. Loether,
415 U.S. 189, 94 S.Ct. 1005,
39 L.Ed.2d 260 (1974) ..... i, 4, 5, 8, 9

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33, 109 S.Ct. 2782,
106 L.Ed.2d 26 (1989) 7

Illinois State Painters Welfare Fund, et al. v. Brummet, et al., No. 03-CV-226
2006 WL 83465 (N. D. Ill., 1-11-06). 9

Local 836 of the United Automobile Aerospace and Agricultural Implement Workers, of America, et al. v. Echlin, Inc., et al.,
670 F.Supp. 697 (E.D. Mich. 1987) 9

Lorillard v. Pons,
434 U.S. 575, 98 S.Ct. 866,
55 L.Ed.2d 40 (1978) ..... i, 4, 5, 8, 9

McDougall, et al. v. Pioneer Ranch Limited Partnership, et al.,
449 F.3d 571 (7th Cir. 2006) 1

New York State Teamsters Conference Pension and Retirement Fund v. Express Service, Inc.,
426 F.3d 640, 646 (2nd Cir. 2005) 8

Oregon Laborers Employers Trust Funds v. Pacific Fence and Wire Company,
725 F.Supp. 786 (D. Oregon 1989) 9

Tull v. United States,
481 U.S. 412, 107 S.Ct. 1831,
95 L.Ed.2d 365 (1987) 8

Statutes

28 U.S.C. § 1254(i) 1
28 U.S.C. §§ 1291 and 1294 ..... 1, 4
29 U.S.C. § 1301 6
29 U.S.C. § 1301(b)(1) 3, 5, 7
29 U.S.C. §§ 1001-1371 1
29 U.S.C. §§ 1002(37) and 1301(a)(3) 1
29 U.S.C. §§ 1381-1461 ..... 2, 4

Other Authorities

U.S. Const. amend. VII 7

Rules

Fed.R.Civ.P. 56(c) 4

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *McDougall, et al. v. Pioneer Ranch Limited Partnership, et al.*, 449 F.3d 571 (7th Cir. 2006)

The Seventh Circuit affirmed the unpublished July 20, 2006 Memorandum Opinion and Order, and the September 29, 2006 Judgment of the United States District Court for the Northern District of Illinois. (*Central States, Southeast and Southwest Areas Pension Fund, et al. v. Pioneer Ranch Limited Partnership, et al.*, (No. 05 C 5908, July 20, 2006))

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(i).

The Seventh Circuit's opinion entered on July 12, 2007. Jurisdiction was invoked in the Court of Appeals pursuant to 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE

Central States, Southeast and Southwest Areas Pension Fund (sometimes "Central States") is a multiemployer pension plan within the meaning of the Employee Retirement Income Security Act (sometimes "ERISA"), 29 U.S.C. §§ 1001-1371[1], amended by the

---

[1] Specifically, 29 U.S.C. §§ 1002(37) and 1301(a)(3) define a multiemployer plan.

Multiemployer Pension Plan Amendments Act of 1980 (sometimes "MMPPA") 29 U.S.C. §§ 1381-1461. Central States sought in this action a Judgment for monetary damages based on alleged employer withdrawal liability (sometimes "EWL"). The EWL that is at issue in this case is based on covered work performed by the employees of a defunct Michigan corporation known as Whiting Distribution Services, Inc. ("WDS")

WDS was a party to a series of collective bargaining agreements with the International Brotherhood of Teamsters requiring WDS to make pension contributions to Central States. WDS was subject to these agreements and paid all contributions for a period of time in excess of twenty-five (25) years.

In 2003, creditors of WDS filed an involuntary bankruptcy proceeding naming WDS as the sole defendant. The matter was converted to a Chapter 7 proceeding in order to allow for an orderly dissolution of the business. As a result of these proceedings, WDS ceased operations and liquidated its assets. WDS stopped work and therefore withdrew from the pension plan effective in December of 2003.

Central States has been subject to unfunded vested benefits since at least 1980. Therefore, the WDS withdrawal triggered an assessment of withdrawal liability by Central States. The appropriateness of the assessment against WDS has never been disputed. Central States filed a claim in the WDS bankruptcy and received an appropriate distribution of WDS assets.

At some time after the WDS withdrawal, Central States determined and alleged that Pioneer Ranch Limited Partnership (sometimes "Pioneer Ranch") was an employer and a member of a controlled group with WDS. As a result, Central States brought this action against Pioneer Ranch and Robert Whiting alleging that Pioneer Ranch was liable for the WDS withdrawal liability because it qualified as a withdrawing employer for purposes of MPPAA. Specifically, Central States alleged that Pioneer Ranch was a "trade or business" under common control of WDS.

Pioneer Ranch has never contested the allegation of common control. Rather, Pioneer Ranch contested from the beginning the question of whether it was a "trade or business." Central States recognized that Pioneer Ranch was not subject to the EWL assessment based on its own contributions. Instead, the Central States' theory of liability against Pioneer Ranch was premised solely on "employer" status through its relationship with WDS. This meant that Central States was required to prove that Pioneer Ranch was a "trade or business" under 29 U.S.C. § 1301(b)(1).

The theory of liability against Robert Whiting was based on his status as a general partner of Pioneer Ranch, and that issue is uncontested.

Pioneer Ranch did not seek arbitration of the 29 U.S.C. § 1301(b)(1) issue.

Defendants answered the Complaint filed by Central States and demanded jury trial. (App. D at 35a). The parties completed discovery and filed cross-

motions for summary judgment pursuant to Fed.R.Civ.P. 56(c).

On July 20, 2006, the district court granted the Central States motion and denied Defendants' motion. (App. B at 32a). The district court's judgment entered on September 29, 2006. (App. C at 33a)

Defendants timely filed a notice of appeal to the United States Court of Appeal for the Seventh Circuit on October 11, 2006. The Seventh Circuit's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1291 and 1294.

On July 12, 2007, the district court's judgment was affirmed.

Pioneer Ranch timely filed this Petition for Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The Court should review this case in order to determine whether the rationale described in the Court's decisions in *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) and *Curtis v. Loether*, 415 U.S. 189, 195, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) establishes the right to jury trial on the purely legal question of whether a party is an employer under the withdrawal liability provisions of ERISA. See 29 U.S.C. §§ 1001-1371 (sometimes "ERISA") and 29 U.S.C. §§ 1381 – 1461 (sometimes "MPPAA"). This is a question of first impression in this Court. The decision of the Seventh Circuit Court of Appeals finding that there is no right to jury trial on

this question is based on a fundamental error in analyzing the mandatory arbitration provision of MPPAA. Petitioners were not required to arbitrate the question of whether Pioneer Ranch was an employer.

The relief sought here can only be characterized as legal in nature. Central States assessed withdrawal liability against WDS in the amount of $3,708,184.31 (App. B at 18a) and then brought an action against Pioneer Ranch seeking the entry of a monetary judgment for that amount plus interest, liquidated damages, costs and attorney fees. Central States' sole theory of liability was premised on 29 U.S.C. § 1301(b)(1). This action resulted in the entry of a monetary judgment in the amount of $4,558,184.20. The judgment contains no provisions for equitable relief. Therefore, *Lorillard* and *Curtis* require a finding that a jury trial is guaranteed in this type of case.

REVIEW OF THIS CASE IS WARRANTED IN ORDER TO CLARIFY THE SCOPE OF THE RIGHT TO JURY TRIAL IN ERISA AND MPPAA CASES IN WHICH THE SOLE RELIEF REQUESTED IS LEGAL, AND THERE IS NO CONGRESSIONALLY MANDATED OBLIGATION TO ARBITRATE THE DISPUTE.

The First Amended Complaint filed in this case sought to impose employer withdrawal liability against Pioneer Ranch solely based on controlled group status. Petitioners never disputed the assessment of liability against Whiting Distribution Services, Inc., the Michigan corporation which was subject to various Teamsters' contracts. Petitioners did not contest

common ownership. However, Petitioners contested the question of whether Pioneer Ranch was an "employer." Specifically, Petitioners argued that Pioneer Ranch was a "trade or business." The contested issue is controlled by 29 U.S.C. § 1301.

Petitioners demanded jury trial in the district court and their right to jury trial was never contested. At the close of discovery, and with a trial date imminent, the parties filed cross-motions for summary judgment and the Court granted the Central States motion.

The question of whether Petitioners were entitled to a jury trial in the district court first surfaced on appeal. In reviewing the grant of summary judgment, the Seventh Circuit considered the appropriate standard of review of the district court's decision. The court applied a "clearly erroneous" standard of review, finding that the standard was appropriate because defendants had no right to jury trial. (App. A at 9a) The court recognized that, if defendants had the right to a jury trial, its review would be "de novo."

This is clearly a close case on the facts. The concurrence noted the following:

> It is somewhat doubtful whether Congress's intent as to the legitimate purposes of withdrawal liability under the Multiemployer Pension Plan Amendments Act is being properly served here. (App. A at p.13a)

The jury trial question is therefore central to this case.

Petitioners contend that they were entitled to a jury trial on the issue of whether Pioneer Ranch was an employer for the purpose of MPPAA. Specifically, they claim the right to jury trial on the contested issue in this case: whether Pioneer Ranch was a trade or business under 29 U.S.C. § 1301(b)(1). The right asserted here is guaranteed by the Seventh Amendment to the Constitution. U.S. Const. amend. VII.

The Seventh Amendment guarantees the right to a jury trial in "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. Because application of the Seventh Amendment requires evaluation of what constitutes a "[s]uit at common law," the right to jury trial has received significant attention from this Court.

For example, this Court noted the following:

> Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

In *Granfinanciera*, this Court noted that the right to a jury trial does not exist in disputes that Congress assigns to a forum in which jury trials are unavailable.

Id. The right to a jury trial may be eliminated, therefore, "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency . . . without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" *Id.* See also: *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 455, 97 S.Ct. 1261 51 L.Ed 2d 464 (1977).

Here, Petitioners accept the mandatory arbitration provision of withdrawal liability disputes that are raised by employer. The confusion below may be based on the fact that the general obligation to arbitrate does not apply to the issue raised here. Courts below have examined the issue of whether "employer" status must be arbitrated and clearly determined that arbitration is not required. *Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792 (7th Cir. 1992); *New York State Teamsters Conference Pension and Retirement Fund v. Express Service, Inc.*, 426 F.3d 640, 646 (2nd Cir. 2005).

Because Petitioners were not required to arbitrate their defense, they were not automatically denied access to a jury trial. In fact, Petitioners' claim is in the form of a legal question rather than an equitable one and seeks the type of remedy "typically enforced in an action at law." See *Lorillard,* 434 U.S. at 577, *Curtis*, 415 U.S. at 195, and *Tull v. United States*, 481 U.S. 412, 417, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

In the context of ERISA litigation when a benefit plan seeks monetary relief, the precise scenario that we have here, Courts have frequently held that a jury

trial is available. See *Local 836 of the United Automobile Aerospace and Agricultural Implement Workers of America, et al. v. Echlin, Inc., et al.*, 670 F.Supp. 697 (E.D. Mich. 1987); *Bugher v. Freightner*, 722 F.2d 1356 (7th Cir. 1983); *Oregon Laborers Employers Trust Funds v. Pacific Fence and Wire Company*, 725 F.Supp. 786 (D. Oregon 1989); *Illinois State Painters Welfare Fund, et al. v. Brummet, et al.*, 2006 WL 83465 (N. D. Ill., No. 03-CV-226, 1-11-06).

If the most important aspect of this case is the remedy sought, then jury trial is appropriate because Plaintiffs sought a monetary judgment. *Curtis*, 415 U.S. at 195.

If the most important aspect is the defense raised, then the same outcome is required because the defense that Pioneer Ranch is not a trade or business and therefore not an employer, is legal in nature. *Lorillard*, 434 U.S. at 577.

This Court has never decided the issue presented here. Certiorari is important in order to clarify the right to jury trial in this context. The nature of the issue raised here is different than the nature of ERISA cases seeking equitable relief. The inapplicability of the mandatory arbitration provision of MPPAA demonstrates the distinction.

CONCLUSION

For these reasons, Petitioners request this Court to grant review of the case.

Respectfully submitted,

Scott Graham
Counsel of Record
Howard & Howard Attorneys, P.C.
151 South Rose Street, Suite 800
Kalamazoo, Michigan 49007
Telephone: 269.382.1483

Counsel for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-3757

[Filed July 12, 2007]

HOWARD MCDOUGALL and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Plaintiffs-Appellees,	)
v.	)
PIONEER RANCH LIMITED PARTNERSHIP and ROBERT S. WHITING, Defendants-Appellants.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 05 C 5908--Suzanne B. Conlon, Judge.

Before BAUER, CUDAHY, and FLAUM, Circuit Judges.

OPINION

FLAUM, *Circuit Judge*. Elaine and Robert Whiting owned Pioneer Ranch Limited Partnership, a vacation

property on which they farmed and raised cattle. The Whitings also owned a trucking company, which, after several years of operation, became bankrupt and ceased doing business. The Central States, Southeast and Southwest Areas Pension Fund ("the Fund"), a multi-employer pension fund, assessed substantial withdrawal liability on the trucking company, but could not collect any of the amount owed. The Fund sued Pioneer Ranch and Robert Whiting for the withdrawal liability. The district court granted the Fund's motion for summary judgment, concluding that Pioneer Ranch was responsible for the trucking company's liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461 (1980). Pioneer Ranch appeals. For the following reasons, we affirm.

I. BACKGROUND

A. Statutory Background

Congress passed the MPPAA as an amendment to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1371. Under ERISA, the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation, protects covered employees by insuring their benefits against fund insolvency or premature termination. Prior to 1980, ERISA's contingent liability provisions gave employers an incentive to withdraw from financially weak multi-employer plans to avoid liability if the plan terminated in the future. As a result, the PBGC reported to Congress that the premiums paid to it were insufficient to cover its expected future liabilities. Congress then passed the MPPAA, seeking to

discourage voluntary withdrawals from multi-employer plans by imposing a mandatory liability on all withdrawing employers. *See Cent. States, Se. and Sw. Areas Pension Fund v. Ditello*, 974 F.2d 887, 888 (7th Cir. 1992). The Act holds such employers liable for their proportionate share of "unfunded vested benefits." 29 U.S.C. § 1381.

Upon an employer's withdrawal from a plan, the trustees of the fund must promptly determine the amount of an employer's liability and create a payment schedule. Within 90 days of notification, the employer may request that the trustees review their determination. 29 U.S.C. § 1399(b)(2)(A). If either party is dissatisfied with the outcome of the review, the MPPAA mandates arbitration proceedings. 29 U.S.C. § 1401(a)(1) ("Any dispute between an employer and the plan sponsor. . . shall be resolved through arbitration."). After arbitration, or if no arbitration proceeding has been initiated, either party may bring an action in federal district court "to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401(b)(2).

Section 1301(b)(1) provides that all "employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." 29 U.S.C. § 1301(b)(1). Under this section, each trade or business under common control is jointly and severally liable for the withdrawal liability of the others. *See Ditello*, 974 F.2d at 889.

B. Facts

In 1970, Robert and Elaine Whiting[1] purchased property located in Cheboygan County, Michigan to use as a vacation home. The Whitings kept a number of cattle and other livestock on the property and conducted some farming and ranching activities. In 1973, the Whitings hired David McCormick to care for the property and assist with the farming and livestock. Over the next twenty years, the Whitings used the property as a vacation home and developed a small cattle herd by buying and selling a few cattle each year.

In 1993, the Whitings established the Pioneer Ranch Limited Partnership. Elaine and Robert were both general and limited partners, and their four children, R. Scott Whiting, Daniel Whiting, Jo Ann Skandalaris, and Jane Whiting were limited partners. Pioneer Ranch's partnership agreement stated that the partnership's purpose was as follows:

> a) acquiring and holding certain real property located in the Township of Aloha, Cheboygan County, Michigan, heretofore owned and managed as a cattle farm by the General Partners.
>
> (b) acquiring additional real and personal property to be used in operating, managing, and expanding the Property, and to engage in the

---

[1] Elaine Whiting died on January 5, 2005, and Robert Whiting died on February 4, 2006.

business of farming, ranching, and any agricultural pursuit or undertaking; and

(c) doing any and all things and carrying on any and all other activities necessary, convenient, or incidental to accomplish any of the preceding purposes and powers or to protect and benefit the Partnership.

After the Whitings established the partnership, they handled the livestock on the ranch the same way they handled it before 1993.

From 1994 through 2003, Pioneer Ranch filed tax returns that contained a schedule listing profits and losses from farming. The schedule indicated that Pioneer Ranch lost money every year after the Whitings established the partnership. On its tax returns, the partnership listed "cattle farm" as its principal business activity, claimed farm expenses, and certified that it was entitled to an agricultural production exemption.

The Whitings also owned a trucking company called Whiting Distribution Services ("WDS"), which operated in Detroit, Michigan. In 2003, WDS, which had been experiencing financial difficulties, entered bankruptcy and wound up its operations. WDS was subject to a series of collective bargaining agreements requiring pension contributions to the Fund. On December 6, 2003, WDS withdrew from the Fund. On January 30, 2004, the Fund demanded that the Whiting Controlled Group pay $3,708,184.81 worth of withdrawal liability pursuant to ERISA, 29 U.S.C. §§ 1382(2) and 1399(b). On August 23, 2005, the Fund

issued another notice and demand to the Whiting Controlled Group that was served on Pioneer Ranch and Robert Whiting. On February 15, 2006, the Whiting Controlled Group, through Pioneer Ranch, received a notice that the withdrawal liability payments were past due. When the Whiting Controlled Group failed to pay the withdrawal liability, the Fund filed suit in federal district court, arguing that it could collect the withdrawal liability from Pioneer Ranch and Robert Whiting because Pioneer Ranch was a "trade or business" under § 1301(b)(1).

On June 15, 2006, the parties filed cross-motions for summary judgment. On July 20, 2006, the district court granted the plaintiffs' motion for summary judgment and denied the defendants' motion, holding that Pioneer Ranch was a trade or business under § 1301(b)(1).

II. DISCUSSION

A. Standard of Review

The initial question presented in this case is the standard by which we review the district court's decision. We ordinarily review a district court's grant of summary judgment in an ERISA case de novo. *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 460 (7th Cir. 1997). However, in *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373-74 (7th Cir. 1992), this Court held that the clearly erroneous standard of review applies when the only issue before the district court is the characterization of undisputed subsidiary facts and where a party does not have the right to a jury trial. In

Slotky, the Court stated that although the fact of whether or not an enterprise is a trade or business is not ordinarily resolved on summary judgment, "[delaying judgment] does not make sense in a case in which the only factual issue is one of characterization,... and the opponent of summary judgment claims no right to a jury trial." *Id.* at 1374. In that scenario, "both the record and the fact-finder are the same in the summary judgment proceeding as they would be in a trial. There is no more evidence to put in and no different trier to evaluate it." *Id.* As we explain below, there is no dispute over the underlying facts in this case. Thus, to determine the appropriate standard of review, we must analyze whether the defendants are entitled to a jury trial.[2]

The Seventh Amendment provides that "[in] Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Supreme Court has long understood " 'suits at common law' to refer not merely to suits that the common law recognized among its old and settled proceedings, but to suits in which legal rights were to be ascertained and determined, in contrast to those where equitable rights and remedies were recognized." *Feltner v.*

---

[2] The appellants stated that they were entitled to a jury trial while the appellees contended that they were not entitled to one, but neither party explained *why* the appellants were or were not entitled to a jury trial. Indeed, both parties presented deficient arguments for their preferred standard of review. Accordingly, it falls to us to reach the merits of the jury trial issue in order to determine the appropriate standard of review.

Columbia Pictures Television, Inc., 523 U.S. 340, 348, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998) (quoting *Parsons v. Bedford*, 28 U.S. 433, 447, 7 L. Ed. 732 (1830)). The general rule in ERISA cases is that there is no right to a jury trial because "ERISA's antecedents are equitable," not legal. *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998). However, § 1301(a)(1) permits plan fiduciaries, employers, participants, or beneficiaries to bring civil suits under Title IV of ERISA and seek appropriate legal or equitable relief with respect to a multi-employer plan. 29 U.S.C. § 1451(a)(1). Though § 1301(a)(1) provides for both legal and equitable remedies in the case of multi-employer pension plan disputes, the few courts that have considered the question have determined that the Seventh Amendment does not guarantee a jury in these types of cases. *See Connors v. Ryan's Coal Co.*, 923 F.2d 1461 (11th Cir. 1991); *Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984).

In *Thompson Building Materials, Inc.*, the Ninth Circuit held that Congress did not violate the Seventh Amendment by requiring employers and plan sponsors to resolve disputes about withdrawal liability through arbitration. 749 F.2d at 1405. The court held that the MPPAA's statutory scheme was not known to the common law, and that Congress may delegate fact-finding functions to non-jury bodies in cases involving newly created statutory rights. *Id.* Likewise, in *Connors*, the Eleventh Circuit held that the defendant was not entitled to a jury in a withdrawal liability collection action brought by multi-employer plan trustees. 923 F.2d at 1465. The court stated that the

MPPAA's mandatary arbitration provisions did not unconstitutionally deprive the liable employer of its right to a jury trial. *Id.*

We agree with the reasoning of our sister circuits. If Pioneer Ranch had proceeded to arbitration to challenge its status as an employer it would not have been entitled to a jury. It is anomalous then to allow the defendants to have a jury trial simply because they avoided the dispute resolution scheme that Congress contemplated in the statute. Because the defendants are not entitled to a jury trial, the Court must review the district court's grant of summary judgment for clear error.

B. Trade or Business

To impose withdrawal liability on an organization other than the one obligated to the Fund, two conditions must be satisfied: 1) the organization must be under "common control" with the obligated organization, and 2) the organization must be a trade or business. *Cent. States, Se. and Sw. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001). The defendants do not dispute that the Whitings controlled both WDS and Pioneer Ranch. The only question, therefore, is whether Pioneer Ranch constitutes a trade or business.

Although the MPPAA does not define "trade or business," this Court has adopted the test established in *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S. Ct. 980, 94 L. Ed. 2d 25 (1987), to determine whether an enterprise constitutes a trade or business. *See Cent. States, Se. and Sw. Areas Pension Fund v. White*, 258

F.3d 636, 642 (7th Cir. 2001); *Fulkerson*, 238 F.3d at 895. Under *Groetzinger*, the Court must consider whether the person engaged in an activity 1) for the primary purpose of income or profit and 2) with continuity and regularity. 480 U.S. at 35. The phrase "trade or business" "does not encompass purely personal activities no matter how continuous or extended the activity may be nor how profitable. . . ." *White*, 258 F.3d at 642 (internal quotation omitted). Additionally, "a sporadic activity, a hobby, or an amusement diversion does not qualify." *Groetzinger*, 480 U.S. at 35.

The parties focus their dispute on whether the Whitings engaged in ranching and farming primarily for the purpose of income or profit. The defendants contend that the Whitings operated Pioneer Ranch for purely personal reasons, as a vacation home and retreat, and created the partnership for estate planning purposes.[3] Additionally, they point out that the Whitings owned the land that became Pioneer Ranch for twenty-two years prior to establishing the partnership and that the manner in which they handled the livestock and farming on the ranch did not change in any way from the manner in which it was handled before 1993. They also emphasize that the

---

[3] The four Whiting children each testified that their parents told them that they established Pioneer Ranch Limited Partnership on the advice of their accountants and lawyers. Though the children's testimony is inadmissible hearsay, there is admissible evidence that the Whitings established Pioneer Ranch for estate planning purposes. Each year the Whitings gave their children untaxable gifts of land, which is consistent with estate planning.

Whitings suffered significant losses for nine straight years after they established the partnership, and that the property's tennis courts, shuffleboard court, and trout pond all demonstrate that the Whitings intended Pioneer Ranch to be a vacation home because those things have nothing to do with ranching or farming. Finally, they allege that the Whitings acquired land that was largely unsuitable for either ranching or farming because Pioneer Ranch was an investment, not a trade or business.

By contrast, the Fund emphasizes the partnership agreement, which stated that the business purpose of Pioneer Ranch was "to engage in the business of farming, ranching, and any agricultural pursuit or undertaking. . . ." Courts have held that "a defendant's stated intention of forming a business is highly relevant, because it constitutes a declaration against interest." *See, e.g.*, *Connors*, 995 F.2d 245 at 254. The Fund also points out that the Whitings constructed fences to hold cattle, sold livestock and grains, employed one full-time employee and two part-time employees, and provided the employees with health, retirement, and workers' compensation benefits. They also highlight the fact that the Whitings' tax returns claimed business exemptions and deductions for farming expenses each year. Moreover, from 1994 through 2003, Pioneer Ranch represented that its principal business activity was cattle farming and that it generated an annual income of $20,000.

On these undisputed underlying facts, the district court held that Pioneer Ranch is a trade or business. Even if this Court might have interpreted the facts differently, a fact finder could reasonably consider the

documentary evidence of the Whitings' intent and conclude that they engaged in the activities on Pioneer Ranch for the primary purpose of income or profit and simply derived incidental personal benefit from Pioneer Ranch.

The defendants maintain that it would be fundamentally unfair to impose withdrawal liability on Pioneer Ranch.[4] They argue that, as in *Fulkerson* and *White*, this Court should reverse summary judgment. *Fulkerson* and *White* are readily distinguishable from this case because they addressed legal errors about whether the activities in those cases were sufficiently regular and continuous, an issue that is undisputed in this case.

Because there are no disputed facts and the defendants are not entitled to a jury trial, if the Court remands the case for a trial, the same trier of fact will consider the same evidence on which it already concluded that no fact-finder could reasonably find that Pioneer Ranch was not a trade or business. Because the district court committed no errors of law, and a reasonable fact finder could conclude that Pioneer Ranch was a trade or business, the district court did not commit clear error.

---

[4] We note that parties are responsible for whatever legal consequences attach to their own choice of business organization. *See Connors*, 995 F.2d at 254.

III. CONCLUSION

For the above reasons, we AFFIRM the district court's grant of summary judgment to the plaintiffs.

CONCUR

CUDAHY, *Circuit Judge*, concurring in the judgment. It is somewhat doubtful whether Congress's intent as to the legitimate purposes of withdrawal liability under the Multiemployer Pension Plan Amendments Act is being properly served here. The majority correctly states that a "trade or business," as defined in *Commissioner of Internal Revenue v. Groetzinger*, requires as its "primary purpose" the realization of "income or profit." 480 U.S. 23, 35, 107 S. Ct. 980, 94 L. Ed. 2d 25 (1987). There is no *clear error* in the district court's conclusion that Pioneer Ranch was primarily intended to make a profit, but the continued existence of the "ranch" in the face of relentless losses suggests otherwise, its founding agreement and tax filings notwithstanding. A reasonable jury could conclude that Pioneer Ranch was a vacation home enhanced by a few livestock and inflated to the status of a "ranch" for tax purposes.

As the majority notes, this makes the case turn on whether Pioneer Ranch is entitled to a jury trial on the fund's claim for withdrawal liability. (Op. at 6-8.) The centrality of this issue entitles it to a degree of rigorous attention to which neither the majority nor, it should be noted, the parties have subjected it. (Although Central States has asserted that Pioneer Ranch is not entitled to a jury trial, and Pioneer Ranch

has asserted the contrary, neither has done much to explain why such a right should or should not exist.)

The majority concludes that Pioneer Ranch is not entitled to a jury because it "avoided the dispute resolution scheme that Congress contemplated in the statute," that is, private arbitration described in 29 U.S.C. § 1401(a)(1). (Op. at 8.) But, whatever it would mean for Congress to "contemplate" arbitration, this court has determined that Congress has not always *required* that every issue in a dispute between a fund and an employer be arbitrated. In *Central States, Se. & Sw. Areas Pension Fund v. Slotky*, we held that "the issue of membership in a controlled group," the very issue that Pioneer Ranch disputes in this case, "cannot be within *exclusive* arbitral jurisdiction. For then people who had absolutely no reason to believe that they might be deemed members of a controlled group would be foreclosed from litigating the issue in any forum." 956 F.2d 1369, 1373 (7th Cir. 1992). We suggested that some defendants might still be required to arbitrate the issue, for instance "if the pension plan explicitly notifies the person of his potential liability," dispelling any notice concerns, but the issue is sometimes properly decided by courts in the first instance. *Id.*; *cf. Central States, Se. & Sw. Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792 n.1 (7th Cir. 1992) (suggesting that a defendant is never required to arbitrate employer status).

If Pioneer Ranch has not evaded any congressionally-required arbitration, it is not clear why its failure to pursue arbitration barred it from jury trial; Pioneer Ranch could have plausibly argued that it has a Seventh Amendment right to a jury trial

in the federal courts, and the availability of a jury trial often depends on the litigants' choice of the forum in which their dispute will be resolved. *See, e.g., Langenkamp v. Culp*, 498 U.S. 42, 44-45, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990) (per curiam); *Statland v. United States*, 178 F.3d 465, 472-73 (7th Cir. 1999). When Congress "provides for enforcement of statutory rights in an ordinary civil action in the district courts," the Seventh Amendment applies and "a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974); *cf. Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 52-53, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989) (explaining that the Seventh Amendment does not apply to disputes that Congress assigns "to a forum in which jury trials are unavailable"). While it may not be entirely clear whether an action for MPPAA withdrawal liability involves such rights and remedies, it is certainly a respectable candidate for them. Money damages are a typically legal remedy, and we have previously held that the Seventh Amendment provides a jury right when a union trust fund seeks contractually required contributions from an employer. *See Bugher v. Feightner*, 722 F.2d 1356, 1357-60 (7th Cir. 1983).

This is not to say that the majority's reasoning is incorrect. It might be that Central States' suit is not an "*ordinary* civil action," even though it is heard in the district courts, *Curtis*, 415 U.S. at 195 (emphasis added), or it might be that the Seventh Amendment does not ensure a jury trial even if it applies. But I think the issue remains somewhat obscure and need not be resolved in the present case. Pioneer Ranch

seems to have forfeited the jury trial issue on appeal by failing to support it with any sort of citation to authority or argument. *Central States, Se. & Sw. Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663, 670 (7th Cir. 2005); *Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990). (The Fund has done almost as little to explain its assertion that Pioneer Ranch had no right to a jury trial, but it has at least cited to *Central States, Se. & Sw. Pension Fund v. Personnel, Inc.*, which by omitting any discussion of the jury issue from its determination of the standard of review arguably suggests that a jury right does not exist. 974 F.2d 789, 792 (7th Cir. 1992).) Even if it had not waived the issue on appeal, Central States "explicitly notifie[d] [Pioneer Ranch] of [its] potential liability" under the MPPAA, which suggests that it might have been required to arbitrate its control group membership. *Central States, Se. & Sw. Areas Pension Fund vs. Slotky*, 956 F.2d 1369, 1373 (7th Cir. 1992). If so, the majority is correct and it has no right to a jury trial.

I would therefore not reach the general issue of whether there is a right to a jury trial in lawsuits to recover MPPAA withdrawal liability under 29 U.S.C. § 1401(b)(1). I otherwise agree with the majority opinion.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION**

Civil Action No.: 05 C 5908

[Filed July 20, 2006]

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, trustee, Plaintiffs,	)
v.	)
PIONEER RANCH LIMITED PARTNERSHIP, a Michigan limited partnership, and ROBERT S. WHITING, an individual, Defendants.	)

JUDGES: Suzanne B. Conlon, United States District Judge.

MEMORANDUM OPINION AND ORDER

Central States, Southeast and Southwest Areas Pension Fund and its trustee, Howard McDougall, sued Pioneer Ranch Limited Partnership and Robert S. Whiting for withdrawal liability pursuant to the

Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1001 *et seq*. The parties cross-move for summary judgment. For the reasons set forth below, plaintiffs' motion for summary judgment is granted, and defendants' cross-motion is denied.

BACKGROUND

The following facts are undisputed unless otherwise noted. This case arises from Whiting Distribution Services, Inc.'s withdrawal from the pension fund in 2003. During all relevant times, Whiting controlled Whiting Distribution, a Michigan-based trucking company. Defs. Facts at ¶ 17; Pls. Facts at ¶ 6. Under its union collective bargaining agreements, Whiting Distribution was obligated to contribute to the pension fund. *Id.* at ¶ 7. Whiting Distribution fulfilled this obligation until December 2003, when it went into bankruptcy. *Id.* at ¶ 8. As a result of the bankruptcy, Whiting Distribution was considered withdrawn from the pension fund, incurring a $3,708,184.81 withdrawal liability. *Id.* at ¶ 9.

As a multiemployer pension plan, the pension fund may recover Whiting Distribution's withdrawal liability from any trade or business under Whiting's control. *See id.* at ¶ 21. The pension fund determined Whiting controlled the Pioneer Ranch, and that the Pioneer Ranch was a trade or business. *See id.* Pursuant to the MPPAA, the pension fund sent a notice and demand for payment to the Pioneer Ranch. *Id.* After receiving the notice, the Pioneer Ranch did not make any payments as requested. *Id.* at ¶ 24. Nor

did it initiate arbitration pursuant to 29 U.S.C. § 1401(a)(1). *Id.* at ¶ 25. Pioneer Ranch's inaction prompted the pension fund to file this case.

Whether the Pioneer Ranch constituted a trade or business under the MPPAA is at the heart of this case. The Pioneer Ranch maintained property located in Aloha Township, Michigan. Defs. Facts at ¶ 11. Whiting acquired the ranch property between 1971 and 1982. *Id.* at ¶¶ 11, 29. He raised cattle and other livestock. *Id.* at ¶ 16. Whiting and his wife, together with their four adult children, formed the Pioneer Ranch as a limited partnership in 1993. Defs. Facts at ¶ 31, Ex. U at 11. Whiting and his wife were general partners holding the majority of shares; their children were limited partners. Defs. Facts at ¶¶ 34-35; Pls. Facts ¶¶ 15-20. The partnership agreement stated that the Pioneer Ranch was to engage in the ranching business for profit. *Id.* at ¶ 26; Defs. Facts Ex. U at 2-3. Since its formation, the partnership employed David McCormick as a manager and provided him with a monthly salary, intermittent health insurance, and retirement benefits. *Id.* Ex. H at 12:8-13:22; Pls. Facts at ¶¶ 56, 59-61. In addition, the partnership employed three short-term workers and maintained a workers' compensation policy for all employees. *Id.* at ¶¶ 63-66. Over the years, the partnership made several improvements to the ranch in furtherance of the ranching business, including a fence and corrals. *Id.* at ¶¶ 70-72. But the ranching business was not profitable. While reporting income from livestock sales, the partnership's tax returns between 1994 and 2003 claimed net losses over $50,000 each year. *Id.* at ¶¶ 34-53; Defs. Facts Exs. K-T. With each federal tax return, the partnership filed a Schedule F (Profit or Loss from

Farming) claiming farm expenses in depreciation, feed, fuel, insurance, and labor. *Id.*

Defendants claim the Pioneer Ranch was set up not as a business, but as an estate planning device, and that the ranch was intended to be nothing more than a vacation home. Defs. Facts at ¶¶ 8, 43-44, 46. To utilize the partnership as an estate planning device, Whiting and his wife conveyed shares of the partnership to their children each year. *E.g.*, Defs. Facts Ex. B at ¶¶ 14-15. According to defendants, the Whitings never expected a profit from the partnership. Defs. Facts at ¶¶ 37, 39-40. They installed a shuffleboard court, a tennis court, and a vinyl fence that were unrelated to a ranching business. *Id.* at ¶ 49. They also acquired property that would never be suitable for ranching. Defs. Facts Ex. H at 16:24-25, 17:1-8. They raised livestock simply because they enjoyed being around animal and observing farm activities. Defs. Facts at ¶ 50.

Based on the foregoing facts, the parties vigorously dispute whether the Pioneer Ranch constituted atrade or business within the meaning of 29 U.S.C. § 1301(b)(1). On cross-motions for summary judgment, they submit affidavits and deposition transcripts of McCormick and the Whitings' four children, as well as volumes of exhibits, including the Pioneer Ranch's formation agreement and tax returns.

DISCUSSION

I. Summary Judgment Standard

On cross-motions for summary judgment, each movant must satisfy Fed. R. Civ. P. 56's requirements. *Cont'l Cas. Co. v. Northwestern Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005). Summary judgment is proper when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A movant has the initial burden of demonstrating that it is entitled to summary judgment. *Cont'l Cas. Co.*, 427 F.3d at 1041. Once a movant has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Cont'l Cas. Co.*, 427 F.3d at 1041. The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the evidence is sufficient to support a reasonable jury verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

II. Withdrawal Liability

Under ERISA and the MPPAA, an employer withdrawing from a multiemployer pension plan is liable for its share of vested, unfunded benefits. 29 U.S.C. §§ 1381(a), 1383. To collect "withdrawal liability," *id.* § 1301(a)(12), a pension fund must serve a withdrawing employer with a notice and demand for

payment. *Id.* § 1399(b). The withdrawing employer may request the pension fund to recalculate the payment demand. *Id.* If dissatisfied with the recalculation, the employer must initiate arbitration to challenge its liability. *Id.* § 1401(a)(1). Failure to initiate arbitration bars an employer from litigating its liability. *See id.; Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1055 (7th Cir. 1988) ("Congress clearly intended all withdrawal liability disputes . . . to be arbitrated").

ERISA extends withdrawal liability to all "trades or businesses (whether or not incorporated) which are under common control" with a withdrawing employer. 29 U.S.C. § 1301(b)(1). Accordingly, an entity that is (1) a "trade or business" and (2) under "common control" with a withdrawing employer is jointly and severally liable for the withdrawing employer's liability. *Id.; Central States, Southeast & Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001).

Whiting Distribution and the Pioneer Ranch were under Whiting's common control. Whiting owned at least 80% of Whiting Distribution's stock. Pls. Facts at ¶ 6. Together with his wife, he owned over 50% of the Pioneer Ranch. *Id.* at ¶¶ 15-16. Thus, he controlled both Whiting Distribution and the Pioneer Ranch. *See* 26 C.F.R. §§ 1.414(c)-2(c)(1), 1.414(c)-2(c)(2)(iii), 1.414(c)-4(b)(5). Defendants do not dispute common control, but vehemently deny that the Pioneer Ranch was a trade or business.

II. Trade or Business

A. Waiver

Plaintiffs contend that because defendants failed to initiate arbitration, they waived the right to challenge their purported withdrawal liability. Plaintiffs rely on 29 U.S.C. § 1401 requiring all "dispute[s] between an *employer* and . . . a multiemployer plan . . . be resolved through arbitration." 29 U.S.C. § 1401(a)(1) (emphasis supplied). This requirement, however, "presupposes a determination that the dispute is with an 'employer.'" *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1372 (7th Cir. 1992). Thus, determination of whether defendants constitute an "employer" falls outside the arbitration requirement. *See Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792 n.1 (7th Cir. 1992) ("[a]lthough [defendant] failed to request arbitration, this dispute is properly before the court because [he] argues that he was not an 'employer'").

Relying on *dicta* from *Slotky*, plaintiffs urge this court to depart from *Personnel*. *Slotky* advised that a defendant who suspects he might be an "employer" under the MPPAA should timely commence arbitration, rather than "tak[ing] his chances on the court's deciding the issue in his favor." *Slotky*, 956 F.2d at 1373. Despite this *dictum*, *Slotky* holds that the issue whether a defendant is an employer cannot be within exclusive arbitral jurisdiction. *Id.* (citing cases). Interpreting *Slotky*, this court has repeatedly rejected the approach urged by plaintiffs, and held that failure to initiate arbitration does not preclude

judicial determination of whether a defendant is an employer within the meaning of 29 U.S.C. § 1301(b)(1). *Central States, Southeast & Southwest Areas Pension Fund v. Progressive Driver Servs., Inc.*, 940 F. Supp. 1311, 1314 (N.D. Ill. 1996) (Nordberg, J.); *see also Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. El Paso CGP Co.*, 2006 U.S. Dist. LEXIS 30085, No. 04 C 7872, 2006 WL 1037152, at *5 (N.D. Ill. Apr. 17, 2006) (Coar, J.) ("the question of whether an entity was ever an MPPAA employer is for the court to determine") (citing cases). Accordingly, plaintiffs' waiver argument is without merit.

In addition to *Slotky*, plaintiffs rely on two distinguishable cases: *Admiral Merchants*, 846 F.2d at 1055, and *Central States, Southeast & Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992). Both *Admiral Merchants* and *Ditello* hold that employers' failure to timely initiate arbitration bars judicial determination on withdrawal liability. *Id.* at 893; *Admiral Merchants*, 846 F.2d at 1055. But neither decision applies the bar to the issue of employer status. In fact, *Ditello* implicitly rejected plaintiffs' proposition by ruling on the issue of employer status in the absence of timely arbitration. *Ditello*, 974 F.2d at 890-92. Thus, plaintiffs' reliance *on Admiral Merchants* and *Ditello* is misplaced.

Because plaintiffs' waiver argument lacks merit, the question whether the Pioneer Ranch is an "employer" within the meaning of 29 U.S.C. § 1301(b)(1) is properly before the court. As discussed above, to be an employer, the Pioneer Ranch must be a trade or business under common control with Whiting Distribution. Because defendants do not

dispute common control, the only disputed issue is whether the Pioneer Ranch is a trade or business.

B. The *Groetzinger* Test

The test for what constitutes a trade or business under 29 U.S.C. § 1301(b)(1) is borrowed from *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 107 S. Ct. 980, 94 L. Ed. 2d 25 (1987), a decision interpreting "trade or business" under the Internal Revenue Code. *Fulkerson*, 238 F.3d at 895. To be a trade or business under *Groetzinger*, the Pioneer Ranch must engage in activities: (1) for the primary purpose of income or profit; and (2) with continuity and regularity. *Groetzinger*, 480 U.S. at 35. Application *of Groetzinger* requires an examination of the facts of each case. *Id* at 36. Accordingly, the court may consider: (1) the Whitings' intent in founding the Pioneer Ranch; (2) the Pioneer Ranch's tax treatment; and (3) the Pioneer Ranch's legal form and activities. *Personnel*, 974 F.2d at 794-95. None of these factors are dispositive. *Id*

C. Continuity and Regularity

The Pioneer Ranch clearly engaged in ranching activities with continuity and regularity. Between 1994 and 2003, the Pioneer Ranch raised livestock and generated income from livestock sales each year. Defs. Facts at ¶ 33. The partnership filed income tax returns for nine consecutive years. *See* Defs. Facts Exs. K-T. At all relevant times, the partnership paid a monthly salary to at least one employee. Defs. Facts at ¶¶ 24-25, Ex. H at 12:2-3. The partnership periodically acquired new property and made improvements on

existing property. Pls. Facts at ¶¶ 69-72. The partnership's activities, conducted with regularity for nine years, satisfy the requirement of continuity and regularity. *Personnel*, 974 F.2d at 794-95 (finding continuity and regularity where defendant bought and sold several parcels of real property each year for four years); *see also Central States, Southeast & Southwest Areas Pension Fund v. Neiman*, 285 F.3d 587, 594-95 (7th Cir. 2002) (finding continuity and regularity where defendant made monthly payments of management fees and filed tax returns for two years); *cf. Fulkerson*, 238 F.3d at 893 (finding no regularity where defendant bought three parcels of property in ten years).

D. Income or Profit

Documentary evidence conclusively establishes that the Pioneer Ranch operated a ranching business designed to produce income or profit. The Whitings' choice to form a limited partnership signifies their intention to set up a business. *Fulkerson*, 238 F.3d at 895 (a "formally organized business organization" strongly suggests that it is a "trade or business"). More importantly, the Pioneer Ranch's formation agreement stated that the partnership was to engage in the ranching business for profit:

> 2.5 Purpose of Business
>
> The purpose[s] for which the Partnership has been formed . . . are as follows:
>
> (a) acquiring and holding certain real property located in the Township of Aloha, Cheboygan

> County, Michigan, heretofore owned and managed as a beef and cattle farm by the General Partners . . .;
>
> (b) acquiring additional real and personal property to be used in . . . *the business of farming, ranching* and any agricultural pursuit or undertaking; and
>
> (c) doing any and all things . . . to *protect and benefit the Partnership.*

Defs. Ex. U at 2-3 (emphasis supplied). This unambiguous statement evinces the Whitings' intention to derive profit from the Pioneer Ranch. Consistent with its stated purpose, the partnership improved and expanded the ranch's property. Pls. Facts at ¶¶ 69-72. In addition, the partnership employed a full-time manager and three short-term workers to maintain the ranch and to raise livestock. *Id* at ¶¶ 34-53, 56-65. The livestock sales generated an annual income of over $20,000 between 1994 and 2003. Defs. Facts Exs. K-T. These facts compel the conclusion that the Pioneer Ranch was a trade or business. *See Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Kelly*, 1996 U.S. Dist. LEXIS 12901, No. 95 C 501, 1996 WL 507258, at *9 (N.D. Ill. Sept. 4, 1996) (Coar, J.) (leasing a ranch constitutes a trade or business).

The Pioneer Ranch's tax returns from 1994 through 2003 further show the partnership operated as a trade or business. For instance, the partnership filed a Michigan Single Business Tax Annual Return and a U.S. Partnership Return of Income in 1997. Pls. Facts

Ex. D at ¶¶ 2-3. In both returns, the partnership declared an income of $39,385 from livestock sales and expenses of $142,319. *See generally* Defs. Facts Ex. N; Pls. Facts Ex. D. In Schedule F of the federal return, the partnership listed in detail its business expenses: casual labor, farm maintenance, telephone expenses, livestock purchase, and meat processing expenses. *Id.* (Form 165 Schedule F Statement 6). In addition, Whiting and his wife each reported a loss of $50,956. *Id.* (Form 165 Schedule K-1). In a similar manner, the partnership filed federal and state tax returns for nine years. *See* Defs. Facts Exs. K-T. These tax returns are strong evidence that the Pioneer Ranch constituted a trade or business. *Personnel*, 974 F.2d at 795. In *Kelly*, the tax treatment of a ranch lease gave rise to a finding of "trade or business." 1996 U.S. Dist. LEXIS 12901, 1996 WL 507258, at *9. Kelly inherited a ranch and leased it to a rancher in exchange for a share of the proceeds earned through livestock sales. *Id.* Like the Pioneer Ranch, he filed Schedule Fs (Profit or Loss from Farming) claiming losses. *Id.* Based on the tax returns, this court concluded "that [Kelly] treated the ranch as a 'trade or business' designed to produce income." *Id.* The same conclusion is inescapable here.

The Pioneer Ranch's employment practices also shed light on its business purpose. Not only did the partnership employ a full-time manager and three short-term workers, but it also provided health insurance, workers' compensation, and retirement benefits for its employees. Pls. Facts at ¶¶ 56-66. The continuous, sophisticated employment practices undercut any assertion that the partnership was set up as an estate planning device or for personal enjoyment. *See Groetzinger*, 480 U.S. at 35 (gambling

activities requiring skills are not a hobby, but a trade or business); *cf. Central States, Southeast & Southwest Areas Pension Fund v. White*, 258 F.3d 636, 643 (7th Cir. 2001) (leasing garage apartments from one's own residence is akin to personal investment and therefore does not constitute a trade or business). Undisputed documentary evidence -- from the Pioneer Ranch's formation agreement, its tax returns, to its employment practices -- firmly establishes that it operated as a trade or business. *Personnel*, 974 F.2d at 795.

III. Issues of Material Fact

Based on the documentary evidence, plaintiffs are entitled to summary judgment unless defendants raise a genuine issue of material fact as to whether the Pioneer Ranch constituted a trade or business. *See* Fed. R. Civ. P. 56(e). Defendants argue the Pioneer Ranch was set up as an estate planning device and purely for personal enjoyment, relying chiefly on the affidavits and deposition testimony of the Whitings' children. *See* Defs. Facts Exs. F-J. As discussed below, however, defendants' evidence fails to give rise to an issue of material fact.

The Whitings' four children, as limited partners of the Pioneer Ranch, testified that neither they nor their parents ever intended the Pioneer Ranch to be a business. *E.g.*, Defs. Facts Ex. F at 22:15-25. Their self-serving assertion of intent, however, cannot clear the evidentiary hurdle posed by the Pioneer Ranch's stated purpose in the partnership agreement. *Kelly*, 1996 U.S. Dist. LEXIS 12901, 1996 WL 507258, at *9 (granting summary judgment to plaintiffs because a

"self-serving statement of intent is not probative of whether an enterprise amounts to a 'trade or business'") (citing cases). Nor can their testimony cast doubt on a finding supported by ample documentary evidence of the Pioneer Ranch's income-generating operation. *See id.* ("defendant must point to objective evidence that he did not intend to create a business). They further testified the ranch served only as a vacation home and an estate planning device, and that livestock was raised solely for personal enjoyment. *E.g.*, Defs. Facts Ex. G at 12:3-14. Consistent with the purported recreational purposes, they installed a trout pond, a shuffleboard court, a tennis court, and a vinyl fence. *See* Defs. Facts at ¶ 49, Ex. H at 16:20-17:25. Viewed in the most favorable light, their testimony shows the Whitings derived incidental personal benefits from the Pioneer Ranch. Defendants fail to cite any legal authority for the proposition that evidence of incidental personal benefits precludes a finding of trade or business. Where, as here, documentary evidence conclusively establishes defendants operated a trade or business, summary judgment is appropriate. *Personnel*, 974 F.2d at 795 (granting summary judgment for pension fund because defendant's tax treatment of his leasing activities provided "strong evidence" that he operated a trade or business).

Arguing the contrary, defendants cite two distinguishable cases: *Fulkerson*, 238 F.3d at 891, and *White*, 258 F.3d at 636. In both *Fulkerson* and *White*, defendants engaged in real estate investments requiring little more than depositing checks and filing tax returns. *Fulkerson*, 238 F.3d at 896 (defendant "never spent more than five hours in a year dealing

with the leases"); *White*, 258 F.3d at 643 (defendants' performance of routine upkeep on their property is legally insignificant). In contrast, the Pioneer Ranch raised and sold livestock for nine years, and its operation required one full time manager and three short-term workers. Defs. Facts at ¶¶ 16, 33; Pls. Facts at ¶¶ 56-66. Unlike the home-office operations in *Fulkerson* and *White*, the Pioneer Ranch was formally organized as a partnership. *See* Defs. Facts Ex. U. Accordingly, *Fulkerson* and *White* are inapplicable.

Defendants argue that the Pioneer Ranch was not a trade or business under the MPPAA because it was not designed to produce profit or to evade withdrawal liability. This argument lacks merit because the MPPAA "makes no exemption from withdrawal liability for trades or businesses operating at a loss." *Central States, Southeast & Southwest Areas Pension Fund v. Koder*, 969 F.2d 451, 454 (7th Cir. 1992). Nor is withdrawal liability imposed only on businesses designed to fractionalize a withdrawing employer's assets. *See, e.g., Neiman*, 285 F.3d at 596 ("an economic nexus between businesses under common control need not exist to impose withdrawal liability"). In fact, business owners like Whiting have long been warned to "take extra caution in engaging in real estate and other personal investment activities," in order to stay clear of the MPPAA's broad reach. *White*, 258 F.3d at 644. Because defendants fail to raise an issue of material fact with respect to whether the Pioneer Ranch constituted a trade or business, they cannot avoid summary judgment in plaintiffs' favor.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for summary judgment is granted, and defendants' cross-motion is denied. Summary judgment is entered for plaintiffs Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, and against defendants Pioneer Ranch Limited Partnership and Robert S. Whiting.

ENTER:

/s/_____
Suzanne B. Conlon
United States District Judge

July 20, 2006

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No.: 05 C 5908

[Filed September 29, 2006]

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD McDOUGALL, Trustee, Plaintiffs,	)
v.	)
PIONEER RANCH LIMITED PARTNERSHIP, a Michigan limited partnership, and ROBERT S. WHITING, an individual, Defendants.	)

JUDGES: Suzanne B. Conlon, Magistrate Judge Geraldine Soat Brown.

JUDGMENT ORDER

This matter coming before the Court on a motion for summary judgment by the Plaintiffs, the Court having granted that motion in its Memorandum Opinion of July 21, 2006, and the Court being fully

advised in the premises, hereby FINDS, ORDERS and ADJUDGES as follows:

A. That Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee, have and recover judgment from and against the Defendants, Pioneer Ranch Limited Partnership and Robert S. Whiting, jointly and severally, in the total amount $4,558,184.20. This amount consists of $3,594,165.81 in delinquent withdrawal liability payments; $212,336.59 in interest; $718,833.16 in liquidated damages, as allowed pursuant to 29 U.S.C. § 1132(g); $3,434.14 in costs for prosecuting this suit; and $29,414.50 in attorneys' fees.

B. That Plaintiffs are awarded post-judgment interest on the entire judgment balance at an annualized interest rate equal to two percent (2%) plus the prime interest rate established by Chase Manhattan Bank (New York, New York) for the fifteenth (15th) day of the month for which interest is charged and shall be compounded annually as set forth in the Central States Pension Plan and Trust Agreement.

C. That Plaintiffs are awarded execution for the collection of the judgment and cost granted.

Enter: /s/ Suzanne B. Conlon
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 05C 5908

[Filed November 14, 2005]

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, TRUSTEE	)
Plaintiffs,	)
v	)
PIONEER RANCH LIMITED PARTNERSHIP, a Michigan limited partnership, and ROBERT S. WHITING, an individual,	)
Defendants.	)

JURY TRIAL DEMANDED

AMENDED
ANSWER TO COMPLAINT

Defendants, Pioneer Ranch Limited Partnership, a Michigan Limited Partnership, and Robert S. Whiting,

Individually, answer the Complaint and plead affirmative defenses as follows:

1. This is an action for collection of withdrawal liability, interest, and penalties incurred by an employer as a result of a withdrawal from a multiemployer pension plan.

Answer: Paragraph 1 states a legal conclusion to which no answer is required.

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, by the Multiemployer Pension Plan Amendments Act of 1980, ("MPAA"), 29 U.S.C. §§ 1001-1461. This Court has jurisdiction over this action under sections 502(e), 502(f), and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e), 1132(f) and 1451(c)

Answer: Paragraph 2 states a series of legal conclusions to which answers are not required. Defendants admit that the action purports to be based on the statutory provisions identified in Paragraph 2.

3. Venue lies in this Court under sections 502(e)(2) and 4301(d) of ERISA, 29 U.S.C. §§ 1132(e)(2) and 1451(d), in the Central States, Southeast and Southwest Areas Pension Fund is administered at its principal place of business in Rosemont, Illinois.

Answer: Admitted that venue is appropriate in this Court. Defendants further contend that venue is appropriate in the Western District of Michigan, where both

Defendants reside. Defendants contend that the cause should be transferred to the United States District Court for the Western District of Michigan pursuant to 28 U.S.C. § 1404(a).

4. Plaintiff Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") is a multiemployer pension plan within the meaning of sections 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301 (a)(3). Plaintiff Howard McDougall is a present Trustee and a "fiduciary" of the Pension Fund and the Trustees are collectively the plan sponsor of the Pension Fund within the meaning of section 4001 (a) (10) of ERISA, 29 U.S.C. § 1301 (a) (10). The Trustees administer the Pension Fund at 9377 West Higgins Road, Rosemont, Illinois 60018.

Answer: Defendants lack knowledge and information sufficient to form a belief as to the truth of each of the allegations contained in Paragraph 4 of the Complaint.

5. Pursuant to sections 502(a)(3) and 4301(a)(1) of ERISA, 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1), the Trustees are authorized to bring this action on behalf of the Pension Fund, its participants and beneficiaries for the purpose of collecting withdrawal liability.

Answer: Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint.

6. Defendant Robert S. Whiting is an individual who is a citizen of the State of Michigan.

Answer: Admitted.

7. Defendant Pioneer Ranch is a Michigan limited partnership with its principal place of business located in the State of Michigan.

Answer: Admitted.

8. Whiting Distribution Services, Inc., ("Whiting") was a Michigan corporation with its principal place of business located in the state of Michigan.

Answer: Admitted.

9. Whiting was subject to a series of collective bargaining agreements between itself and various unions affiliated with the International Brotherhood of Teamsters, under which Whiting was required to make contributions to the Pension Fund on behalf of certain of its employees.

Answer: Admitted.

10. As of December 6, 2003, Robert S. Whiting owned at least 80% of the total combined voting power of all classes of stock of Whiting entitled to vote and/or at least 80% of the total value of shares of all classes of stock of Whiting.

Answer: Admitted.

11. As of December 6, 2003, Robert S. Whiting was a general partner and limited partner of Pioneer

Ranch owning at least 30.62% of the profit interest of such partnership.

Answer: Admitted.

12. As of December 6, 2003, Elaine S. Whiting was a general partner and limited partner of Pioneer Ranch owning at least 26.01% of the profit interest of such partnership.

Answer: Admitted.

13. As of December 6, 2003, Robert S. Whiting and Elaine S. Whiting were married.

Answer: Admitted.

14. As a result of the attribution rule prescribed by 26 C.F.R. §1.414(c)-4(b) (5) (i), Robert S. Whiting is considered to own the profit interest of Pioneer Ranch owned by Elaine S. Whiting.

Answer: The allegation contained in paragraph 14 of the Complaint contains a legal conclusion to which no answer is required.

15. As of December 6, 2003, R. Scott Whiting was a child of Robert S. Whiting.

Answer: Admitted.

16. As of December 6, 2003, R. Scott Whiting owned at least 10.12% of the profit interest of Pioneer Ranch.

Answer: Admitted.

17. As of December 6, 2003, Daniel L. Whiting was a child of Robert S. Whiting.

Answer: Admitted.

18. As of December 6, 2003, Daniel L. Whiting owned at least 10.12% of the profit interest of Pioneer Ranch.

Answer: Admitted.

19. As of December 6, 2003, Jo Ann Skandalaris was a child of Robert S. Whiting.

Answer: Admitted.

20. As of December 6, 2003, Jo Ann Skandalaris owned at least 10.12% of the profit interest of Pioneer Ranch.

Answer: Admitted.

21. As of December 6, 2003, Jane Ann Whiting was a child of Robert S. Whiting.

Answer: Admitted.

22. As of December 6, 2003, Jane Ann Whiting owned at least 10.12% of the profit interest of Pioneer Ranch.

Answer: Admitted.

23. As a result of the attribution rule in 26 C.F.R. §1.414(c)-4(b)(6), Robert S. Whiting is considered to own the profit interests in Pioneer Ranch of R. Scott Whiting, Daniel L. Whiting, Jo Ann Skandalaris, and Jane Ann Whiting.

Answer: The allegation contained in Paragraph 23 of the Complaint states a legal conclusion to which no answer is required.

24. As of December 6, 2003, Robert S. Whiting owned at least 80% of the profit interest in Pioneer Ranch.

Answer: The allegation contained in Paragraph 24 of the Complaint states a legal conclusion to which no answer is required.

25. Whiting and Pioneer Ranch constitute a brother-sister group of trades of businesses under common control as defined by 26 C.F.R.1.414(c)-3(c).

Answer: Denied as untrue.

26. Whiting and Pioneer Ranch and all trades or businesses under common control with them (the "Whiting Controlled Group") constitute a single employer within the meaning of Section 4001 (b)(1) of ERISA, 29 U.S.C. § 1301 (lo)(1), and the regulations promulgated thereunder.

Answer: Denied as untrue.

27. The Whiting Controlled Group is the employer for purposes of the determination and

assessment of withdrawal liability under Title IV or ERISA.

Answer: Denied as untrue.

28. The Pension Fund has determined that on or about December 6, 2003, Whiting permanently ceased to have an obligation to contribute to the Pension Fund, and thereafter, no member of the Whiting Controlled Group as obligated to contribute to the Pension Fund, thereby effecting a "complete withdrawal" as defined in section 4203 of ERISA, 29 U.S.C. § 1383.

Answer: Defendants lack knowledge and information sufficient to form a belief as to the truthfulness of each of the allegations contained in Paragraph 28 of the Complaint.

29. As a result of this complete withdrawal, all entities constituting the Whiting Controlled Group, including Pioneer Ranch, incurred withdrawal liability to the Pension Fund in the amount of $3,708,184.81, as determined under section 4201(b) of ERISA, 29 U.S.C. § 1381(1o).

Answer: Denied as untrue.

30. On or about August 23, 2005, the Whiting Controlled Group, through the Pioneer Ranch Limited Partnership received a notice and demand for payment of withdrawal liability issued by the Pension Fund in accordance with sections 4202(2) and 4219(b) (1) of ERISA, 29 U.S.C. §§ 1382 and 1399(b) (1). The notice and attached invoice notified Pioneer Ranch that it

was required to discharge its liability in a lump sum or in 98 monthly payments of $49,363.29 beginning October 1, 2005 and a final payment of $3,686.74 due on December 1, 2013.

Answer: Defendants admit that the notice was received. Defendants deny that Pioneer Ranch Limited Partnership is part of the "Whiting Controlled Group." The remaining factual obligations contained in Paragraph 30 are self-explanatory based upon the terms of the notice.

31. Pursuant to 29 U.S.C. §§ 1399(c)(2) and 1401 (d), withdrawal liability payments must be made in accordance with the schedule set forth in the plan sponsor notwithstanding any request for review of arbitration.

Answer: The language in the statutory provisions cited in Paragraph 31 is self-explanatory. Defendants contend that payments are not required by entities who do not qualify as trades or businesses pursuant to 29 U.S.C. § 1301(b)(1).

32. The Whiting Controlled Group has failed to make any of the withdrawal liability payments to the Pension Fund.

Answer: Defendants admit that no payments have been made. Defendants plead affirmatively that no payments are owed.

33. Defendant Robert S. Whiting, as a general partner of Pioneer Ranch, is liable for all debts and liabilities of Pioneer Ranch, including the liabilities owed to the Pension Fund.

Answer: The allegation contained in Paragraph 33 contains a legal conclusion to which no answer is required. The allegation is otherwise denied as untrue.

WHEREFORE, Defendants request this Court to enter Judgment in favor of Defendants and against Plaintiffs finding no cause of action.

Defendants further request the Court to order that Defendants are entitled to an award of their attorney fees and costs in defending this action.

Date: November 14, 2005

HOWARD & HOWARD ATTORNEYS, P.C.

BY: s/Scott Graham
Scott Graham, Attorney for Defendants

BUSINESS ADDRESS:
151 South Rose Street, Suite 800
Kalamazoo, Michigan 49007
Telephone Number: 269.382.1483
sgraham@howardandhoward.com
Illinois ARDC 3129219

AFFIRMATIVE DEFENSES

1. Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund is not a proper Plaintiff in this action because it lacks standing.

2. Defendant, Pioneer Ranch Limited Partnership has no liability because it is not an employer as defined by 29 U.S.C. § 1301 (b)(1).

3. Pioneer Limited Partnership has no liability because it is not part of a "Controlled Group" with Whiting Transport as defined by Title 29.

4. Robert Whiting has no liability in this matter because Pioneer Ranch has no liability.

5. This matter should be transferred to the United States District Court for the Western District of Michigan, where both Defendants reside and where virtually all fact witnesses in this case reside.

6. The amounts sought in this Complaint are the subject of accord and satisfaction in bankruptcy based upon the resolution of contested issues.

Date: November 14, 2005

HOWARD & HOWARD ATTORNEYS, P.C.

BY: s/Scott Graham
Scott Graham, Attorney for Defendants
BUSINESS ADDRESS:
151 South Rose Street, Suite 800
Kalamazoo, Michigan 49007

Telephone Number: 269.382.1483
sgraham@howardandhoward.com
Illinois ARDC 3129219

APPENDIX E

AMENDMENT VII
RIGHTS IN CIVIL CASES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. § 1301(b)(1)

An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under Section 414(c) of Title 26.